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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

SIDNEY ZERNIT,

Petitioner,

against

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Sidney Zernit, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment of that court entered on October 22, 1943 affirming a judgment of the United States District Court for the Southern District of New York entered on February 20, 1943 convicting petitioner of a violation of the Selective Training and Service Act of 1940 (50 U. S. C., App., Sec. 301ff).

Statement of Matters Involved

Petitioner was indicted and convicted for failure and refusal to report for induction into the United States Army pursuant to order of his local draft board in violation of the Selective Training and Service Act of 1940.

At the trial petitioner offered to prove in defense to the indictment (1) that he had duly claimed exemption from military service, both combatant and non-combatant, under Sec. 5g of the Selective Training and Service Act of 1940 (50 U. S. C., App., Sec. 305g), on the ground that he was conscientiously opposed thereto by reason of religious training and belief; (2) that this claim was denied by the local board and by the appeal board, acting upon and adopting the recommendation of the hearing officer who investigated the claim and held a hearing thereon, on the sole ground that although petitioner was conceded to be conscientiously and sincerely opposed to participation in military service, both combatant and non-combatant, he was nevertheless not opposed thereto by reason of religious training and belief as required by the statute; and (3) that in reaching this decision the draft boards erroneously construed the term "religious training and belief" contained in the statute as not affording exemption to one having the beliefs of the petitioner (R. 34-36).

The proof so offered by petitioner was objected to by the government and excluded by the trial judge on the authority of *United States* v. *Kauten,* 133 Fed. 2d 703 (C. C. A. 2d Cir. 1943), the court stating, "I will sustain the objection and make the ruling * * * that disobeying the order of the local board, which is final, is a violation of the Selective Training and Service Act, and therefore I find the defendant guilty" (R. 37).

The petitioner excepted to this ruling and moved to dismiss the indictment on the ground that the induction order which the petitioner was charged with having disobeyed, being based on an error of law in the construction of the statute as aforesaid, was unlawful and void; this motion was denied (R. 37, 38). Petitioner was thereafter sentenced to three years imprisonment (R. 5).

Petitioner, admittedly having conscientious scruples against all military service, could not submit to induction without violating his conscience, and therefore was unable to avail himself of the only remedy open to him under the *Kauten* decision, namely a writ of *habeas corpus* after induction. See *United States ex rel. Phillips* v. *Downer,* 135 Fed. 2d 521 (C. C. A. 2d Cir. 1943). Since he could not in good conscience submit to induction for the purpose of getting a court to review the draft classification which he claimed was based on a mistaken construction of the law, petitioner found himself, under the court's ruling, unable to obtain any judicial review of the illegal order of induction. He was therefor *convicted for violation of an unlawful order, without having had an opportunity to defend himself* by showing the illegality.

Jurisdiction

The jurisdiction of this court is invoked under the Judicial Code, Sec. 240(a) (U. S. C., Title 28, Sec. 347a).

Question Presented

Did the courts below err in ruling that petitioner could not show in defense to an indictment charging him with failure to report for induction that the induction order

was unlawful because based on denial of petitioner's claim to exemption as a conscientious objector through an erroneous construction of the phrase "by reason of religious training and belief" contained in Section 5g of the Selective Training and Service Act of 1940?

Statute Involved

It is provided in Section 5g of the Selective Training and Service Act of 1940 (50 U. S. C., App., Sec. 305g, 54 Stat. 885):

> "Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Any such person claiming such exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board, shall, if he is inducted into the land or naval forces under this Act, be assigned to non-combatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be assigned to work of national importance under civilian direction. Any such person claiming such exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board provided for in section 10(a) 2 (310 [a] [2] of this Appendix). Upon the filing of such appeal with the appeal board, the appeal board shall forthwith refer the matter to the Department of Justice for inquiry and hearing by the Department or the proper agency thereof. After appropriate inquiry by such agency,

a hearing shall be held by the Department of Justice with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board (1) that if the objector is inducted into the land or naval forces under this Act, he shall be assigned to noncombatant service as defined by the President, or (2) that if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be assigned to work of national importance under civilian direction. If after such hearing the Department finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall give consideration to but shall not be bound to follow the recommendation of the Department of Justice together with the record on appeal from the local board in making its decision. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors."

Reasons for Allowance of Writ

The court below has decided an important question of law, which has not yet been settled by this court, although this court has twice granted writs of certiorari to review decisions of lower courts on this same issue. *Bowles* v. *United States*, 318 U. S. 749, and *Falbo* v. *United States*, ... U. S. ..., 87 L. Ed. 1362. The *Bowles* case was affirmed on another ground, 319 U. S. 33, so that the question here presented was not decided. In a dissenting opinion, however, in which Mr. Justice Reed concurred, Mr. Justice Jackson said (319 U. S. 33 at 38):

> "The court does not consider whether one may be convicted for disobeying an invalid order; and I do not care to express a final opinion on the subject, since the disposition of the matter by the court precludes its determination of the question. But I would not readily assume that, whatever may be the other consequences of refusal to report for induction, courts must convict and punish one for disobedience of an unlawful order by whomsoever made."

The *Falbo* case is about to be argued in this court, and the decision will presumably control petitioner's case. But even so this case should be reviewed, as the *Falbo* case involves refusal to report for work of national importance by one claiming complete exemption as a minister of religion, whereas the present case involves refusal to report for induction by one claiming exemption from military service as a conscientious objector. Petitioner believes that the difference in the facts in the two cases should not result in any different rule of law being applied, but in order that the lower courts and litigants may be left with no doubt that the *Falbo* decision will apply to the case of a conscientious objector who has refused to report for induction, it is necessary for this court to review and decide this case.

The question presented is one of great importance, involving dangerous and novel inroads on the rights of a defendant in a criminal trial; it is of importance to many persons, as hundreds of conscientious objectors have been imprisoned under the identical circumstances which this case presents;* it is a question which is the subject of

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* See page 11, "The Conscientious Objector and the Law" by Julien Cornell, The John Day Company, New York, 1943.

sharply conflicting decisions in the several circuits;* and it is a question which cannot be squarely decided in the *Falbo* case which is now before the court, as the facts are different. It is therefore of great importance that the court settle the issue raised here.

WHEREFORE, petitioner prays that a writ of certiorari may issue out of and under the seal of this court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that court to certify and send to this court this cause and a complete transcript of the record and of all proceedings had herein; to the end that this cause may be reviewed by this court; that the judgment of the United States Circuit Court of Appeals for the Second Circuit be reversed; and that petitioner may have such other and further relief in the premises as this court may deem appropriate.

Dated: November 12, 1943.

SIDNEY ZERNIT,
Petitioner.

JULIEN CORNELL,
ERNEST ANGELL,
Solicitors for Petitioner.

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* *United States* v. *Kauten*, 133 Fed. 2d 703 (C. C. A. 2d Cir.);
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United States v. *Bowles*, 131 Fed. 2d 818 (C. C. A. 3rd Cir.);
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Goff v. *United States*, 135 Fed. 2d 610 (C. C. A. 4th Cir.);
Rase v. *United States*, 129 Fed. 2d 204 (C. C. A. 6th Cir.);
Johnson v. *United States*, 126 Fed. 2d 242 (C. C. A. 8th Cir.);
Seele v. *United States*, 133 Fed. 2d 1015 (C. C. A. 8th Cir.).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

SIDNEY ZERNIT,

Petitioner,

against

UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION

Opinions Below

No opinion was expressed by the United States District Court for the Southern District of New York except such as was stated at the trial, which appears in the Record at folio 37 and is quoted in the petition. No opinion was expressed by the United States Circuit Court of Appeals for the Second Circuit, the judgment of the court below being affirmed in open court.

Jurisdiction

The judgment of the United States Circuit Court of Appeals for the Second Circuit now sought to be reviewed was entered on October 22, 1943. Jurisdiction of this court is invoked under Sec. 240(a) of the Judicial Code, 28 U. S. C. Sec. 347(a).

Statement of the Case

A summary statement of the case and of the argument is set forth in the petition.

Specification of Assigned Errors

It is intended by petitioner to urge all the assignments of error, six in number, filed in the lower court (R. 22-28). These assignments of error raise in substance the issue of the lower court's refusal to allow petitioner to show in defense to an indictment charging him with failure to report for induction that the induction order was unlawful because based on denial of petitioner's claim to exemption as a conscientious objector through an erroneous construction of the phrase "by reason of religious training and belief" contained in Section 5g of the Selective Training and Service Act of 1940.

ARGUMENT

The courts below erred in ruling that petitioner could not show in defense to an indictment charging him with failure to report for induction that the induction order was unlawful because based on denial of petitioner's claim to exemption as a conscientious objector through an erroneous construction of the phrase "by reason of religious training and belief" contained in Section 5g of the Selective Training and Service Act of 1940.

The trial court convicted the petitioner, after excluding his defense that the order he disobeyed was invalid, on the ground that the order was nevertheless final and not subject to review by the court, citing as authority for this

ruling *United States* v. *Kauten,* 133 Fed. 2d 703. The Circuit Court of Appeals affirmed the conviction, adhering to its earlier decision in the *Kauten* case. The question so decided, and presented here for review, has been considered in a number of other cases in the Circuit Courts of Appeal which are cited in the petition herein on page 7, and has been recognized by this court to be of such importance that writs of certiorari have twice been granted to review decisions of lower courts on that question.* But the question is as yet unsettled by this court, and unless the writ prayed for in this petition is granted will remain unsettled as to conscientious objectors refusing induction, although the case of *Falbo* v. *United States* (October Term, 1943, No. 73) now before this court will settle the question as to persons claiming exemption as ministers and refusing work of national importance.

Since the same basic issue is now before the court in the *Falbo* case, in which the undersigned has filed a brief *amicus curiae,* and since the issue has been extensively briefed for this court both as applied to the case of a conscientious objector (*Bowles* v. *United States,* 319 U. S. 33) and the case of a minister of religion (*Falbo* v. *United States, supra*), petitioner will not now burden the court with a repetition of arguments with which the court is already familiar from the briefs and arguments in those cases.

Petitioner merely desires to point out that while this court's decision in the *Falbo* case may settle in principle the issue here involved, anything which the court may say in that case as to conscientious objectors refusing induction will be only *dictum.* It is therefore important that the

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* *Bowles* v. *United States,* 318 U. S. 749;
Falbo v. *United States,* ..... U. S. ....; 87 L. Ed. 1362.

court decide the precise question raised here, as well as the question raised on the *Falbo* case, although both will turn on the same principle of law.

As to the merits of the point raised in this brief, petitioner begs permission to refer the court to the brief filed for the petitioner in *Bowles* v. *United States, supra,* and the briefs filed for petitioner and by the undersigned *amicus curiae* in *Falbo* v. *United States, supra,* which contain full argument of the point here made.

Conclusion

It is therefore respectfully submitted that this court grant the petition for certiorari so that it may settle the issue of law involved in this and many other similar cases and prevent injustice done to the petitioner.

Respectfully submitted,

JULIEN CORNELL,
Solicitor for Petitioner.

ERNEST ANGELL,
Of Counsel.

(19)

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In the Supreme Court of the United States

OCTOBER TERM, 1942

SIDNEY ZENITT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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In the Supreme Court of the United States

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No. 501

SIDNEY ZERNIT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

STATEMENT

Petitioner was charged in a one-count indictment filed in the District Court for the Southern District of New York with having unlawfully and knowingly failed to report for induction into the United States Army, contrary to the duty imposed upon him pursuant to the Selective Training and Service Act of 1940 and the rules and regulations issued thereunder (R. 3). At the trial before the district judge without a jury,[1] the Gov-

[1] Petitioner, by signed stipulation and in open court, upon examination by the judge, waived trial by jury (R. 10, 14–15).

ernment for its proof offered in evidence a stipulation of facts signed by both petitioner and his counsel (R. 11, 13–15). The stipulation showed that petitioner registered with Local Board No. 91 in New York City on October 16, 1940, and filled out and filed his Selective Service questionnaire on or about July 17, 1941 (R. 13–14). He was classified I–A (available for military service) by the local board on February 10, 1942. He appealed this classification, and on October 23, 1942, the board of appeal likewise classified him I–A by unanimous vote. On December 22, 1942, the local board mailed petitioner an order to report for induction into the Army on January 11, 1943. He failed to report on that date or at any time thereafter. (R. 14.)

For his defense petitioner claimed that the order to report for induction was void because "he was erroneously classified as available for military service, whereas under a proper construction of Section 5–g of the Act his exemption as a conscientious objector should have been granted" (R. 11–12).[2] In support of this claim he offered to prove that (R. 12)—

[2] The provisions of the Selective Training and Service Act of 1940 and of the regulations referred herein are copied in the Appendix to the Government's brief in *Falbo* v. *United States*, No. 73, present Term, at p. 79, *et seq.* Section 5 (g) of the Act provides for the exemption from combatant military training and service or from both combatant and noncombatant military service, as the case may be, of any person who "by reason of religious training and belief, is

* * * when he filed his selective service questionnaire he claimed to be conscientiously opposed to participation in all wars by reason of religious training and belief, including both combatant and non-combatant service; that he filed the proper statement of the nature of his views; his claim was denied by the local board and by the appeal board acting upon and adopting the recommendation of the Honorable Monroe Goldwater, who investigated his claim and held a hearing,[3] on the sole ground that although he is conceded to be conscientiously and sincerely opposed to military service, either combatant or non-combatant, he was not opposed thereto by reason of religious training and belief; and that in reaching this conclusion the draft board erroneously construed the term "re-

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conscientiously opposed to" such service. The power to hear and determine such claims for exemption is committed to the local boards (Secs. 5 (g) and 10 (a) (2)), and their decisions are final except where an appeal is authorized in accordance with regulations prescribed by the President (Sec. 10 (a) (2)).

[3] See pp. 40–41 of the Brief for the United States in *Falbo* v. *United States*, No. 73, now pending before this Court, for a description of the procedure on appeal by persons asserting conscientious objections. Under this procedure the appeal board transmits the registrant's file to the Department of Justice for an inquiry and hearing on the character and good faith of his conscientious objections. The Department then submits a report and recommendation to the appeal board, and although it is not bound by the recommendation, the board is required to give it consideration. (See Sec. 5 (g) of the Act and Reg. 627.25.) It is apparent from petitioner's offer of proof that this procedure was followed in his case.

ligious training and belief" as it appears in Section 5–g of the Act, as applied to one having the belief of the defendant.

Relying on the decision of the court below in *United States* v. *Kauten,* 133 F. (2d) 703, decided February 8, 1943, the Government objected to the admission of the proffered evidence on the ground that the Selective Service classification was not subject to review in the criminal proceeding and that petitioner's proper remedy was to submit to induction and then, if accepted, to seek review in habeas corpus (R. 12–13). The objection was sustained on that ground (R. 13). A motion by petitioner to dismiss the indictment which alleged that the order to report was unlawful and void was also denied (R. 13). The trial judge found petitioner guilty (R. 13) and sentenced him to imprisonment for three years (R. 4). On appeal, the judgment was affirmed in open court (R. 19).

DISCUSSION

Assuming that petitioner's offer of proof was specific enough under the circumstances of the case,[4] the question posed by the petition is whether

[4] The offer of proof did not specify the nature of petitioner's training and belief nor did it indicate in what respect the draft board misconstrued the statutory term "religious training and belief." However, the Government did not object to the offer on the ground that it was too vague and the trial court's refusal thereof was not predicated on that ground (*supra*).

a defendant is entitled to assert as a defense to an indictment for failure to report for induction that his I–A classification and the consequent order to report were based upon a misconstruction of the statute. That question was pretermitted in *Bowles* v. *United States,* 319 U. S. 33, at the last Term, but, as petitioner frankly concedes (Pet. 6), it is closely analogous to the issue now pending before the Court in *Falbo* v. *United States,* No. 73, argued on November 19, 1943. The latter case involves a registrant who claimed complete exemption as a minister and who sought to assert as a defense to an indictment charging failure to report for work of national importance that his classification as a conscientious objector (Class IV–E) was not based upon evidence, but was arbitrary and capricious. But these differences do not, in our opinion, distinguish the two cases. For in either case the Selective Service classification is final (Sec. 10 (a) (2)) and by the terms of the penal provision of the Act the registrant is bound to "perform any duty required by him under or in execution of this Act, or rules or regulations made pursuant to this Act" (Sec. 11). And the considerations which we urged in the *Falbo* case against permitting a registrant to defy an order to report and then challenge his classification in the consequent criminal prosecution on the ground that it is not supported by evidence apply as well in a case where, as here, the

registrant chooses to disobey such an order because he conceives it to be based upon a misconstruction of the statute.

We agree with petitioner, therefore, that the decision in the *Falbo* case will be controlling in principle on the question posed in the petition. Accordingly, we think it would be appropriate, assuming that petitioner's offer of proof was adequate, for the Court to withhold disposition of the petition for writ of certiorari in this case until it has decided the *Falbo* case.

Respectfully submitted.

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